STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v CORDERO DEANDRE JONES, Defendant-Appellant.	UNPUBLISHED February 26, 2008 No. 276822 Oakland Circuit Court LC No. 2006-211642-FC

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of armed robbery, MCL 750.529, for which the trial court sentenced him to serve a term of imprisonment of eight to 30 years. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Complainant testified that defendant displayed what appeared to be a firearm in the course of taking money from him. When the police confronted defendant with their suspicions, at the house where defendant lived with his parents, heated arguments ensued. According to a police witness, defendant protested that he had been in the house all day, because he had stitches on his foot and was unable to walk. Defendant's mother in turn demanded to know how defendant might commit a robbery with stitches in his foot. The officer testified that there had been no mention to defendant's mother that defendant was suspected of such a crime.

Defendant's sole substantive argument on appeal is that this testimony concerning the statements of his mother was erroneously admitted. We disagree.

The trial court overruled a hearsay objection on the ground that the witness was recounting a question defendant's mother had asked, and that questions are not hearsay. See *People v Jones* (*On Rehearing After Remand*), 228 Mich App 191, 218; 579 NW2d 82, modified in part on other grounds and remanded 458 Mich 862; 587 NW2d 637 (1998). Indeed, the question attributed to defendant's mother included the assertion that defendant's foot had stitches, which was neither inculpatory of him nor a matter in dispute, but only implied that she presumed that the police were investigating a robbery. On appeal, defendant does not renew his hearsay objection, but instead challenges that evidence on the related ground that its admission violated his right to confront an adverse witness.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). To the extent that defendant seeks relief over an unpreserved issue, our review is limited to ascertaining whether there was plain error affecting substantial rights; the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The Sixth Amendment of the United States Constitution guarantees the right of a criminal accused "to be confronted with the witnesses against him . . . ." See also Const 1963, art 1, § 20. The Confrontation Clause recognizes confrontation, or cross-examination, as an indispensable means of testing the truthfulness of testimonial assertions, and does not admit of substitution by other means. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Accordingly, the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify,[[1]] and the defendant had had a prior opportunity for cross-examination." *Id.* at 53-54. Statements given to the police are testimonial in nature "when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813; 126 S Ct 2266, 2273-2274; 165 L Ed 2d 224 (2006). However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), citing *Crawford, supra* at 59 n 9.

We conclude that the incriminating statement attributed to defendant's mother was not testimonial in nature. Although she was responding to questioning by the police, she did not offer incriminating information by way of any assertion on her part, but instead, according to the police witness, inadvertently signaled her understanding that the police were investigating a robbery in the course of asking a question intended to avert suspicions of defendant. Defendant's mother did not assert that a robbery had taken place, but rather asked how defendant might commit one with his injured foot. Defendant's mother was not answering a question from the police, but rather posing a question to challenge the wisdom of continuing to suspect defendant. We therefore reject defendant's strained argument that defendant's mother's inadvertent indication that she assumed that the police were investigating a robbery as any kind of testimonial statement.

For the same reason that the trial court properly overruled the hearsay objection, the court would properly have overruled the same objection proffered under the rubric of confrontation.

Because defense counsel objected to the testimony in question on the ground of hearsay, and would have had no better success affixing the label "confrontation" instead, we reject defendant's cursory argument that the failure to put forward the latter objection constituted

[1] For present purposes, we will assume, without deciding, the truth of defendant's assertion that his mother was unavailable to testify.

ineffective assistance of counsel. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Finally, defendant requests a remand for the purpose of correcting a minor error in his presentence investigation report (PSIR). In particular, the Evaluation and Plan reports that defendant pleaded guilty to the charge, but it is undisputed that defendant was convicted following a jury trial.

"Critical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the presentence investigation report." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). Accordingly, the PSIR "should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report." *Id.* Where this is not the case, remand is appropriate so that the trial court can correct the report and transmit a corrected copy to the DOC. *Id.* at 276.

In this case, defendant reports that the trial court in fact issued an order for the correction in question, and plaintiff reproduced the order and appended it to the brief on appeal. We note that the order also calls for correction of the scoring of three offense variables. The copy of the PSIR before this Court reflects the latter corrections, but continues to announce that defendant was convicted by plea.

But because the trial court issued the necessary order, we do not deem the administrative failure to carry it out perfectly germane to this appeal. We decline either to remand this case to the trial court for a redundant order of correction, or to assert general supervisory powers over DOC administration. We instead leave defendant to the remedies available to him if the error in the PSIR is not administratively corrected as ordered by the trial court.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis